IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 165 of 2005.

Decided on : September 18, 2006.

Hoshiar Singh **…..Appellant.**

VERSUS

Smt. Vidya Devi & ors. **…..Respondents.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?[1]

For the Appellant : **Mr.K.D.Sood, Advocate with Mr. Sanjeev Sood, Advocate.**

For the Respondents : **Mr. Bhupender Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate.**

Surjit Singh, Judge (Oral)

Heard and gone through the record.

2. Appellant- plaintiff filed a suit for separate possession of his share by partition in the joint property and also for issuance of permanent prohibitory injunction, as also for mandatory injunction. It was alleged that certain piece of land was jointly owned by the appellant – plaintiff and the respondents- defendants and that there had been an arrangement between the parties, pursuant to which one part of the joint property was in occupation of the plaintiff and the other in occupation of the respondents- defendants and that the appellant- plaintiff had raised construction upon his portion, while the

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Whether the reporters of the local papers may be allowed to see the Judgment?

portion of the respondents- defendants was vacant. It was stated that without getting the property formally partitioned, the defendants had started raising construction in such a way as to obstruct that portion of the property, which was agreed to be kept open for passage and for flow of used water / drain water. It was alleged that respondents-defendants had erected certain pillars and intended to raise construction on the pillars in such a way as to cover a portion of that vacant space. Therefore, besides seeking partition, the appellant-plaintiff sought relief of permanent prohibitory injunction restraining the respondents- defendants from changing the nature of the suit property till partition by metes and bounds had taken place. Relief of mandatory injunction directing the defendants- respondents to demolish the pillars erected by them was also sought.

3. Defendants- respondents contested the suit and one of the objections raised by them was that there were other co-owners and without impleading them as respondents, suit for partition was not competent. It was denied that the defendants- respondents wanted to usurp any portion in excess of the portion given to them pursuant to the arrangement between the plaintiff and the defendants or that any passage or any vacant site left for flow of water was being covered under the construction.

4. It appears that the appellant- plaintiff did not press his plea of partition in view of the objection regarding non-joinder of all co-sharers. It has been admitted during the course of the hearing that another suit for partition has been filed by the appellant- plaintiff. The trial court framed various issues arising out of the pleadings and

recorded the evidence led by the parties. Ultimately, the trial court granted decree of permanent prohibitory injunction as also mandatory injunction in favour of the plaintiff- appellant. Respondents-defendants went in appeal to the court of District Judge. District Judge, has partly accepted the appeal and set aside the decree of mandatory injunction, directing the respondents- defendants to remove the pillars already erected.

5. Appellant- plaintiff is aggrieved by the decree of the District Judge, whereby the trial court's decree regarding mandatory injunction has been reversed. It is alleged that the construction raised by the defendants- respondents is going to obstruct the passage, as also the flow of rain water / public drain water towards the eastern side of the property. Cross-objections have been filed by the respondents- defendants. They are aggrieved by the affirmation of decree of permanent prohibitory injunction.

6. I have heard the learned counsel for the parties. I see no merit in the grievance of the appellant- plaintiff against the reversal of the decree of the trial court by the District Judge to the extent of mandatory injunction. I have gone through the plaint. It is not the case of the appellant- plaintiff that the construction that has already been raised has caused any obstruction either in the passage or the flow of water. As a matter of fact, I find a report of the Local Commissioner on the file of the trial court, at pages 279 to 285. There is a mention at page 281 that the rain and used water of the portion of the property, which is in occupation of the plaintiff-appellant directly flows into the drain on the eastern side and the said

drain according to the plan Ex. P-13 abuts on a moterable road. The portion on which pillars are shows to have been erected is to the South of the portion in occupation of the appellant- plaintiff. Now if the rain water or the used water of the portion in occupation of the plaintiff- appellant flows directly towards East and falls into a drain, the question of such water flowing towards the portion on which pillars have been erected and which is to the South does not arise. In view of the above stated position, I find no fault in the decree of the first appellate court reversing the decree of trial court to the extent of mandatory injunction. No substantial question of law arises, hence, the appeal is dismissed before admission.

7. Since the appeal has not been admitted, the cross-objections are also dismissed. Otherwise also, counsel representing the defendants- respondents does not press the cross-objections, because of the dismissal of the appeal.

CMP No. 272 of 2005.

8. Interim order, dated 8.4.2005, stands vacated and the application is dismissed.

September 18, 2006. **(Surjit Singh)**
(Hem) **Judge.**